[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FLOYD LANDIS, Plaintiff-Appellant, v. TAILWIND SPORTS CORP. AND JOHAN BRUYNEEL, Defendants-Appellees, UNITED STATES, Plaintiff-Appellee.	Civil Action No. 18-7143

APPELLANT FLOYD LANDIS' REPLY IN SUPPORT OF MOTION TO DISMISS AND FOR ORDER DIRECTING THE UNITED STATES TO PROVIDE A CONSENT TO DISMISSAL BY THE PROPERLY AUTHORIZED ATTORNEY GENERAL OF THE UNITED STATES

Paul D. Scott, Bar. No. 41985
pdscott@lopds.com
Lani Anne Remick
laremick@lopds.com
LAW OFFICES OF PAUL D. SCOTT, P.C.
435 Pacific Avenue, Suite 200
San Francisco, California 94133
Tel: (415) 981-1212
Fax: (415) 981-1215
Attorneys for Appellant Floyd Landis

I. INTRODUCTION

The Government seeks to avoid a decision on the validity of Mr. Whitaker's appointment, by arguing in effect that the validity of the Attorney General is irrelevant to the conduct of the affairs of the United States Department of Justice ("DOJ"), except insofar as his duties require him to act personally in a particular matter. This position, however, is at odds with the statutes and regulations governing the delegation of authority at the Department of Justice, which explain how the powers of the Assistant Attorney General for the Civil Division ("Civil AAG") and certain other DOJ officials are derived from, and thus dependent upon, the Attorney General's own powers. But if the Court concludes in the first instance that the appointment of Mr. Whitaker as Acting Attorney General was invalid, then the Court should also conclude that Deputy Attorney General Rosenstein is, and has been, the Acting Attorney General pursuant to the automatic succession provision of 28 U.S.C. § 508(a), which would make the United States' consent to dismissal in this case valid and make it unnecessary to address the delegation issue.[1]

[1] Since the United States filed its response to appellant's motion, an additional action has been filed in the D.D.C., challenging the validity of Mr. Whitaker's appointment and seeking declaratory or injunctive relief or a writ of *quo warranto*. *Michaels v. Whitaker*, Case No. 18-cv-2906.

II. ARGUMENT

A. Appellant Has Standing.

It is uncontested that appellant has Article III standing to pursue this False Claims Act ("FCA") appeal. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000). The Government challenges appellant's standing to request the relief sought in his motion, but all of the cases cited by the United States involve challenges to the plaintiffs' original standing to bring suit or appeal, and none support the Government's contention that appellant must establish additional standing to raise a relevant issue in his existing case. Response at 9.

Even if some showing were necessary, this Court has previously made clear that the threshold is extremely low for Appointments Clause challenges like the one being made here. In *Landry v. F.D.I.C.*, 204 F.3d 1125, 1130-32 (D.C. Cir. 2000), the Court overruled the FDIC's objection, similar to the Government's position here, that the appellant had failed to show any prejudice from an alleged Appointments Clause violation. The Court explained that when an appellant makes a "structural" challenge, *i.e.*, a challenge that goes to the structure of the three branches of Government, appellate review is appropriate even absent a clear link between the error and harm to the challenging party. *Id.* at 1131 ("For Appointments Clause violations, demand for a clear causal link to a party's harm

will likely make the Clause no [separation of powers] wall at all . . . . [J]udicial review of an Appointments Clause claim will proceed even where any possible injury is radically attenuated."). Moreover, *Landry* did not turn on the personal involvement of the ALJ whose appointment was challenged, as the Government suggests. Response at 9 n.2. To the contrary, the Court took pains to explain that review was appropriate even though the ALJ's decision was only a recommendation and "[t]he FDIC itself determined Landry's responsibility after reviewing the ALJ's recommended decision *de novo*." *Landry*, 204 F.3d at 1130; *cf. Ryder v. United States*, 515 U.S. 177, 186 (1995) (describing policy in favor of deciding Appointments Clause challenges on their merits so as to incentivize challenges).

In the instant case, the United States contended, and the District Court agreed below, that an FCA action cannot be voluntarily dismissed without the Attorney General's consent. *United States ex rel. Landis v. Tailwind Corp.*, No. 1:10-cv-00976-CRC (D.D.C.), ECF 306 & 309; 31 U.S.C. § 3730(b)(1). Moreover, as the Settlement Agreement is not being challenged by either party, it must be presumed to be enforceable, meaning the United States has a separate contractual obligation under the agreement to provide proper consent. *SW Gen., Inc. v. Nat'l Labor Relations Bd.*, 796 F.3d 67 (D.C. Cir. 2015) (actions of invalid official treated as valid unless aggrieved party raises timely challenge), *aff'd on*

other grounds, 137 S. Ct. 929 (2017).[2] Appellant thus has both a contractual right and a significant stake in the United States providing a valid consent to dismissal; otherwise, the dismissal entered by this Court may be unlawful, which could potentially impact the enforceability of the underlying agreement and also cause the later expenditure of additional time and expense to sort out the ramifications of a dismissal based on an unauthorized consent.[3]

Separately, the Court is permitted by its own rules to address the issue raised by appellant. Federal Rule of Appellate Procedure 42(b) provides that "[a]n appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court." *See, e.g., Process Gas Consumers Group v. F.E.R.C.*, 912 F.2d 511 (D.C. Cir. 1990) (adjudicating motion for voluntary dismissal). The United States does not dispute that it agreed to a settlement requiring it to provide the Attorney General's lawful consent to dismissal. *See* Motion, Ex. 1 at par. 3. Accordingly, the Court can address the issue raised by appellant under Rule 42(b).

---

[2] The United States objects to the fact that appellant agreed to a settlement with the United States then later challenged the Acting Attorney General's ability to consent to dismissal, Response at 5, but there is no inconsistency in appellant wishing to keep his agreement with the Government while still wanting to ensure that the Government provides a properly-authorized consent to dismissal of this appeal.

[3] In the district court, the absence of Government consent to a settlement led to appellant litigating the case against the same settling defendants for an additional two years. *See United States ex rel. Landis v. Tailwind Corp.*, No. 1:10-cv-00976-CRC (D.D.C.), ECF 309 & 576.

B. While the Court Need not Resolve the Issue Here, the Authority of the Assistant Attorney General Depends on the Validity of the Attorney General.

As detailed below, appellant's position is that any delegated authority of the Civil AAG derives from the authority vested in the Attorney General. Thus, if Mr. Whitaker was not validly appointed, he has no authority to delegate and the Civil AAG has no authority from Mr. Whitaker to consent to the dismissal of this matter. As noted *infra*, however, if the Court holds that Mr. Whitaker's appointment was invalid from the outset -- and that Deputy Attorney General Rosenstein therefore is and has been Acting Attorney General since Mr. Sessions resigned, pursuant to the automatic succession provisions of 28 U.S.C. § 508 -- then appellant would agree that the Civil AAG had the delegated authority of Mr. Rosenstein in his role as Acting Attorney General and the consent in this case would be valid.

If the Court elects to address the delegation issue raised by the United States, the following is pertinent.

The authority to litigate cases on behalf of the United States flows to different components of the Department of Justice in different ways. As an initial matter, with certain exceptions not relevant here, Congress has vested all of the authority of the Department of Justice in the Attorney General. 28 U.S.C. § 509 ("All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney

General . . .”). United States Attorneys and the Solicitor General are also directly authorized by Congress with authority to litigate certain categories of cases. *See, e.g.*, 28 U.S.C. § 547 (“Each United States attorney shall, within his district, . . . prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned . . . .”); 28 U.S.C. § 518(a) (“Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court . . . .”).

Assistant Attorney Generals, by contrast, have no authority of their own. They only have the authority to exercise the powers of an individual -- the Attorney General -- that are delegated to them. *See* 28 U.S.C. § 510 (“The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.”); 28 U.S.C. § 506 (“Assistant Attorneys General . . . shall assist the Attorney General in the performance of *his* duties.”) (emphasis added).

This statutory framework provides the authority for, and proscribes the limits of, any regulations delegating authority within DOJ to the Assistant Attorney Generals. *See* 28 C.F.R. Part 0 (listing as authority 28 U.S.C. §§ 509, 510, 515-519 and 5 U.S.C. § 301). Accordingly, to the extent that the nominal Attorney

General has no authority, there is nothing to delegate to the Assistant Attorney General for the Civil Division. *Cf. Railroad Yardmasters of America v. Harris*, 721 F.2d 1332, 1344 n.31 (D.C. Cir. 1983) (observing if a valid Board was not extant, "the powers of the Board that were delegated also would cease to exist, and the remaining employee would have no powers to exercise").

The United States focuses on 28 C.F.R. § 0.13(a) as the source of the Civil AAG's authority to consent to dismissal of this appeal, but that contention is incorrect. Response at 6. That regulation, similar to the statute it cites, clearly states that the authority it delegates is limited to the authority of U.S. Attorneys. 28 C.F.R. § 0.13(a) ("Each Assistant Attorney General . . . is authorized to exercise the authority of the Attorney General under 28 U.S.C. 515(a), . . . to designate Department attorneys to conduct any legal proceeding . . . which United States attorneys are authorized by law to conduct . . . .").[4] United States Attorneys, however, do not have independent statutory authority to litigate FCA cases. United States Attorneys are permitted to bring and resolve cases on behalf of the United States under 28 U.S.C. § 547, "except as otherwise provided by law," and the FCA explicitly states that it is the Attorney General who has the authority to

[4] The reason for this structure is that U.S. Attorneys were created as part of the Judiciary Act of September 24, 1789 but had separate authority from the Attorney General. 1 Stat. 73. Only later were the U.S. Attorneys put under the supervision of the Attorney General when the Department of Justice was created in 1870. *See* Act of June 22, 1870, 16 Stat. 162; *see also* 28 U.S.C. §§ 515 & 519.

bring FCA cases and consent to their dismissal. 31 U.S.C. § 3730(a) ("The Attorney General diligently shall investigate a violation . . . the Attorney General may bring a civil action . . ."); *id.* at § 3730(b)(1) ("action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting"). The Civil AAG thus does not derive his authority to litigate or resolve FCA cases from U.S. Attorneys under 28 C.F.R. § 0.13(a).

Instead, the source of the Civil AAG's authority to litigate and resolve FCA cases comes from a partial delegation of authority by the Attorney General under 28 C.F.R. Part 0. Section 0.45(d) assigns the Civil AAG to "conduct[], handle[], and supervise[] FCA matters." Section 0.160 sets forth the Assistant Attorney General's delegated authority to compromise cases, and Section 0.164 describes the Assistant Attorney General's delegated authority to close cases, but only in consultation with the Attorney General when the Assistant Attorney General believes the matter should receive the personal attention of the Attorney General.[5] The Civil AAG then redelegates to staff and to the U.S. Attorneys certain of the Civil AAG's own delegated authority to handle, compromise and close FCA cases. *See* 28 C.F.R. Part 0, Subpart Y, Appendix.[6]

---

[5] Here, of course, the Civil AAG did not have the option of consulting with a valid Attorney General as required by Section 0.164(b), unless Mr. Rosenstein was Acting Attorney General during the relevant period.

[6] Notably, the Civil AAG's delegation to the U.S. Attorneys in the Appendix to Subpart Y would be unnecessary if the U.S. Attorneys had independent

In the False Claims Act, Congress explicitly gives the power to consent to dismissal under 31 U.S.C. § 3730(b)(1) of the FCA to a particular person -- the Attorney General, not the Department of Justice more generally -- and if that person is not validly in office, a regulation cannot overrule the statute and reroute power around that person to make it flow directly to the Civil AAG instead. The regulatory framework by which the Attorney General's authority to litigate FCA cases is delegated to the Civil AAG is thus irrelevant when, as here, there is no authority to delegate.

The Government's suggestion that Mr. Rosenstein holding the position of Deputy Attorney General somehow solves the problem is flawed for the same reason as its arguments regarding the authority of the Assistant Attorney Generals. If Mr. Rosenstein were not Acting Attorney General, he would just have those powers that flowed through to him from the Attorney General by operation of regulation, and as Mr. Whitaker is not a valid Acting Attorney General, no power could come from Mr. Whitaker to Mr. Rosenstein. *See* 28 C.F.R. § 0.15(a) (Deputy Attorney General is "authorized to exercise all the power and authority of the Attorney General"). Only if Mr. Rosenstein is Acting Attorney General can

---

authority to litigate FCA cases. *Cf. Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (one statutory provision should not be read to render another superfluous).

power properly flow to him under the False Claims Act and then on down to his subordinates as called for by relevant DOJ regulations.

The Supreme Court's decision in *United States v. Nixon*, 418 U.S. 683, 695-96 (1974) does not alter the analysis. Even if the regulations delegating the powers of the Attorney General are deemed to have continuing effect on successive Attorney Generals, those regulations can still only deliver whatever power exists in the person of the Attorney General in office at the time. *Nixon* involved a properly-appointed Attorney General's attempt to exercise power delegated by his predecessor to a Special Counsel. The case did not involve the question of whether the Attorney General himself had valid authority which the regulations continued to delegate.

If anything, the *Nixon* decision supports appellant's position, for the Court commented favorably on its prior holding in *Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954) which recognized that "the original authority [being delegated] was *his* [the Attorney General's] . . . ." *Nixon*, 418 U.S. at __ (emphasis added); *id.* (also noting that in *Accardi* "the Attorney General delegated certain of *his* discretionary powers") (emphasis added). Consistent with *Nixon*, appellant's contention is that the authority being delegated is that of the Attorney General, and by virtue of his appointment being statutorily and

constitutionally invalid, Mr. Whitaker does not satisfy this threshold criteria of having "original authority" that can be delegated.

Likewise, in *United States v. Morton Salt Co.*, 216 F. Supp. 250, 256 (D. Minn. 1962), *aff'd*, 382 U.S. 44 (1965), there was no question about the validity of the original source of the relevant official's authority. The Court held that the Acting Deputy Attorney General's appointment of counsel to handle a grand jury investigation was still valid when a new individual took over as Deputy Attorney General. There was no allegation that the Attorney General, the Deputy Attorney General, or the Acting Deputy Attorney General ever lacked proper authorization to hold office, so there was a continuous source of power to be delegated.

The Seventh Circuit's holding in *Champaign County v. U.S. Law Enforcement Assistance Admin.*, 611 F.2d 1200, 1207 (7th Cir. 1979) is similarly inapposite. Though it involved an Assistant Administrator exercising power delegated to him by an Administrator who was no longer in office at the time, the actual source of that power was not the Administrator; it came from the Law Enforcement Assistance Administration to which he reported. *See id.* at n.10 (noting that authority to delegate came from 42 U.S.C. § 3752 (1976)); 42 U.S.C. § 3752 (1976) ("*The Administration* may delegate . . . such functions as it deems appropriate.") (emphasis added); *see also Railroad Yardmasters of America v. Harris*, 721 F.2d 1332, 1343 (D.C. Cir. 1983) ("The delegation in this case was

institutional rather than personal. . . . Institutional delegations of power are not affected by changes in personnel, but rather continue in effect as long as the institution remains in existence and the delegation is not revoked or altered.").

C. The Court's Ruling Need Not be Disruptive.

The dire warning in the Government's brief, suggesting that appellant's position would "create a chaotic condition in the administration of the affairs of the Department of Justice," is misplaced here. Response at 7 (internal citation omitted). As noted *supra*, if the Court holds that Mr. Rosenstein automatically succeeded to the position of Acting Attorney General at the time of Mr. Sessions resignation, then a valid chain of delegated authority remained in place at all times and the consent already provided would be valid.[7]

---

[7] If the Court determines it is necessary to address the delegation issue, it would similarly be nondisruptive for the Court to hold, consistent with the clear language of 28 U.S.C. § 510, that the regulatory delegation of authority to the Civil AAG is dependent upon the validity of the Acting Attorney General's original authority, for a duly authorized person can always be available to serve as Acting Attorney General. The AG Succession Act presently provides for up to 14 different individuals to take over automatically as Acting Attorney General if need be. 28 U.S.C. § 508 (listing the Deputy Attorney General and the Associate Attorney General as replacements and providing that "the Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General"); 28 U.S.C. § 506 (providing for 11 Assistant Attorneys General). If that were not enough, as appellant explained in his opening brief, the Vacancies Act remains available as an alternative to the President in the extremely rare instances where no one is available under the line of succession provided for in the AG Succession Act. Motion at 11, n. 5. Indeed, an Executive Order by the current administration provides for that scenario, listing several Senate-confirmed U.S. Attorneys who can alternatively serve as Acting

Similarly, there is no reason that a holding in this case regarding the invalidity of Mr. Whitaker's appointment need have any impact on the validity of previously unchallenged actions taken by officials below the Attorney General at the Department of Justice. *See S.W. Gen, Inc.*, 796 F.3d at 82-83 (explaining that due to requirement of timely challenge of official's authority during relevant decision-making, future challenges to actions of same official were unlikely to succeed).

III. CONCLUSION

Based on the foregoing, the Court should hold that Mr. Whitaker's appointment was invalid and that Mr. Rosenstein was therefore Acting Attorney General, pursuant to 28 U.S.C. § 508(a), at the time the consent to dismiss was provided by counsel for the United States.

Alternatively, if the Court were to conclude that Mr. Whitaker's appointment was not valid, but Mr. Rosenstein was not Acting Attorney General at the time the Government's consent to dismissal was provided, then the Court should direct the properly designated Acting Attorney General or his authorized representative to ratify the United States' consent to dismissal of this appeal.

Attorney General pursuant to the Vacancies Act, until such time as at least one of the officers mentioned in the AG Succession Act is able to perform the duties of Acting Attorney General. Exec. Order No. 13,787 (Mar. 31, 2017), https://www.gpo.gov/fdsys/pkg/FR-2017-04-05/pdf/2017-06971.pdf

Appellant ultimately is seeking a lawful consent to dismissal from the United States that will permit this case to be voluntarily dismissed.[8]

Dated: December 13, 2018

Respectfully submitted,

/s/

Paul D. Scott, Bar. No. 41985
pdscott@lopds.com
Lani Anne Remick
laremick@lopds.com
LAW OFFICES OF PAUL D. SCOTT, P.C.
435 Pacific Avenue, Suite 200
San Francisco, California 94133
Tel: (415) 981-1212
Fax: (415) 981-1215
Attorneys for Appellant Floyd Landis

[8] Since appellant filed his motion, another district court has entered a decision as to the validity of Mr. Whitaker's appointment. Like the decision in the Western District of Texas referenced by the Government in its response, the case involved the authority of the United States Attorney's office in a criminal case. *United States v. Peters*, No. 6:17-CR-55-REW-HAI-2, 2018 WL 6313534, at *1 (E.D. Ky. Dec. 3, 2018).

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(C), because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,418 words. Appellant filed a timely motion to exceed the 2,600 word length limit for a reply to a motion by 1,000 words, which motion had not yet been acted upon as of the filing date for this reply. Circuit Rule 27(h)(4).

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this document has been prepared in a proportionally spaced typeface using Microsoft Word's Times New Roman 14-point font.

Dated: December 13, 2018 By: /s/
Paul D. Scott, Esq.
Attorney for Appellant Floyd Landis

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December 2018, I electronically filed the foregoing document in this matter with the Clerk of Court using the CM/ECF system to serve the following individuals:

Mr. Blair Gerard Brown: bbrown@zuckerman.com
Ms. Rebecca Anne Worthington: rebecca.worthington@squirepb.com
Ms. Melissa Patterson: melissa.patterson@usdoj.gov
Mr. Charles Scarborough: charles.scarborough@usdoj.gov

and that I further caused a copy of the foregoing document to be served upon defendant Johan Bruyneel by sending a copy to Johan Bruyneel's last known counsel of record by first-class mail to:

Thomas E. Zeno
SQUIRE PATTON BOGGS
2550 M Street, NW
Washington, DC 20037-1350

and by email to Johan Bruyneel's last known counsel Mike Morgan in the United Kingdom at: mike.morgan@morgansl.com

and to be served on Tailwind Sports Corporation by first-class mail at:

Tailwind Sports Corporation
c/o State of Delaware, Secretary of State Jeffery W. Bullock
Delaware Division of Corporations
ATTN: Service of Process
401 Federal Street, Suite 4
Dover, DE 19901

Dated: December 13, 2018

/s/
Paul D. Scott